No 14-556

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE DONALDSON ADOPTION INSTITUTE, CENTER FOR THE STUDY OF SOCIAL POLICY, CHILD WELFARE LEAGUE OF AMERICA, FIRST FOCUS, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, VOICE FOR ADOPTION IN SUPPORT OF PETITIONERS

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March 6, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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B.P. v. State (In re Luke), 640 N.W.2d 374 (Neb. 2002)	8
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Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010)	8
Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014)	17
De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014)	16-17
DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014)	6, 25
DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014)	21
DeBoer v. Snyder, No. 12-10285, slip op. (E.D. Mich. Oct. 16, 2013)	8
Dep't of Human Servs. v. Howard, 238 S.W.3d 1 (Ark. 2006)	23
Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So.3d 79 (Fla. Dist. Ct. App. 2010)	23

TABLE OF AUTHORITIES—Continued

Page(s)

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003) 17

Howard v. Child Welfare Agency Rev. Bd.,
No. 1999-9881, 2004 WL 3154530, and
2004 WL 3200916 (Ark. Cir. Ct. Dec. 29,
2004) 23

In re Adoption of Doe,
2008 WL 5006172 (Fla. Cir. Ct. Nov. 25,
2008) 23

In re Adoption of Jane Doe,
719 N.E.2d 1071 (Ohio Ct. App. 1998) 8-9

Interest of Angel Lace M.,
516 N.W.2d 678 (Wis. 1994) 9

Kerrigan v. Comm'r of Pub. Health,
957 A.2d 407 (Conn. 2008) 24

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 16

Love v. Beshear
989 F. Supp. 2d 536 (W.D. Ky. 2014) 21

Matter of Adams,
473 N.W.2d 712 (Mich. Ct. App. 1991) 8

Obergefell v. Wymyslo,
962 F. Supp. 2d 968 (S.D. Ohio 2013) 9, 21

Plyler v. Doe,
457 U.S. 202 (1982) 22

S.J.L.S. v. T.L.S.,
265 S.W.3d 804 (Ky. Ct. App. 2008) 8

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Windsor,
133 S. Ct. 2675 (2013) ..... *passim*

Weber v. Aetna Casualty & Surety Co.,
406 U.S. 164 (1972) 10-11

STATUTES

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42 U.S.C. § 416(e) 13

Mich. Comp. Laws § 722.1 (2014) 11

N.C. Gen. Stat. § 48-2-301 8

COURT FILINGS

Brief for American Psychological Association as Amici Curiae, *In Re Adoption of Luke*, Case No. S-01-0053 (Neb. Sept. 10, 2001) 18

Transcript of Record, *DeBoer v. Snyder*, No. 12-10285 (E.D. Mich. Feb. 25, 2014), ECF No. 143 26

OTHER AUTHORITIES

American Academy of Pediatrics, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131 Pediatrics 827 (April 2013), *available at* http://pediatrics.aappublications.org/content/early/2013/03/18/peds.2013-0376.full.pdf+html 10, 22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Am. Med. Ass'n, Policy H-60.940, Partner Co-Adoption, *available at* http://www.amaassn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisorycommittee/ama-policy-regarding-sexual-orientation.page 23-24

Ann Maradiegue, *Minor's Rights Versus Parental Rights: Review of Legal Issues in Adolescent Health Care*, 48 Journal of Midwifery & Women's Health 170 (2003) 11-12

Anu R. Sharma et al., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part II. Age of Adoption*, 18 Children and Youth Services Rev. 101 (1996) 22

Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 The Future of Children 31 (2004), *available at* http://futureofchildren.org/futureofchildren/publications/docs/14_01_02.pdf 20

Brent Miller et al., *Comparisons of Adopted and Non-Adopted Adolescents In A Large, Nationally Representative Sample*, 71 Child Development 1458 (2000). 22

TABLE OF AUTHORITIES—Continued

Page(s)

Bryce Covert, *When Parents Can't Enroll in Medicaid, Children Stay Uninsured*, N.Y. Times, Sept. 26, 2012, http://parenting.blogs.nytimes.com/2012/09/26/when-parents-cant-enroll-in-medicaid-children-stay-uninsured/?_r=0 12-13

Colleen Sullivan et al., Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care*, (2001), *available at* http://www.jimcaseyyouth.org/sites/default/files/documents/youthinthemargins_2001.pdf 29

Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 JCAPN 70 (2008), *available at* http://www.alumniofcare.org/assets/files/jcap_134.pdf 20-21

Ellen C. Perrin, M.D. & the Committee on the Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (February 2002), *available at* http://pediatrics.aappublications.org/content/109/2/341.full.pdf+html ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Emily Haney-Caron and Kirk Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*, 1 Psychology of Sexual Orientation and Gender Diversity 19 (2014), *available at* http://www.apa.org/pubs/journals/features/sgd-0000020.pdf 19

Evan Wolfson, Why Marriage Matters (Simon & Schuster, eds., 2005) 16

Gary J. Gates, Williams Institute, *LGBT Parenting in the United States* (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-..... 25

Internal Revenue Service, *Publication 501: Exemptions, Standard Deductions, and Filing Information* (2014), *available at* www.irs.gov/ publications/p501) (last visited February 26, 2015)..... 15

James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 Pediatrics 349 (2006)..... 16, 24

Joseph J. Carroll, *Avoiding Backlash: The Exclusion of Domestic Partnership Language in the 2008 Amendments to the Uniform Probate Code and the Future for Same-Sex Intestacy Rights*, 85 Temp. L. Rev. 623 (2013)..... 13-14

TABLE OF AUTHORITIES—Continued

Page(s)

Karen Spar and Matthew Shuman, Congressional Research Service, *Child Welfare: Imple-mentation of the Adoption and Safe Families Act (P.L. 105-89)* (Nov. 8, 2004), *available at* http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/RL30759_gb.pdf 27

Leslie Cooper and Paul Cates, American Civil Liberties Union Foundation, *Too High a Price: The Case Against Restricting Gay Parenting* (2006), *available at* https://www.aclu.org/files/images/asset_upload_file480_27496.pdf 20, 28

Movement Advancement Project, Family Equality Council, and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families (Full Report)* (October 2011), *available at* http://www.lgbtmap.org/file/all-children-matter-full-report.pdf ..... *passim*

Movement Advancement Project, Family Equality Council, and Center for American Progress, *LGBT Foster and Adoptive Families: Finding Children Forever Homes* (June 2012), *available at* http://www.lgbtmap.org/file/finding-children-forever-homes.pdf 28

TABLE OF AUTHORITIES—Continued

Page(s)

Movement Advancement Project, Family Equality Council and Center for American Progress, *Unequal Taxation and Undue Burdens for LGBT Families* (April 2012), *available at* http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf 14-15

M.V. Lee Badgett et al., Williams Institute and Urban Institute, *Adoption and Foster Care by LGBT Parents in the United States* (2007), *available at* http://www.urban.org/uploadedpdf/411437_adoption_foster_care.pdf 25-26, 28, 29

U.S. Dept. of Health and Human Services, Administration for Children and Families, *The AFCARS Report: Preliminary FY 2013 Estimates as of July 2014 (No. 21)* (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf 5, 26, 27

U.S. Dept. of Health and Human Services, Administration for Children and Families, *Working with LGBT Families in Adoption* (2011), *available at* https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf 27, 28

William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 The Future of Children 97 (2005), *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf 17, 18, 24

INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit organizations that seek to improve child welfare and adoption policy and practice so children in need of permanent families are placed in stable, safe, and loving homes; families are supported; and children's well-being is enhanced.

Amici are concerned about the impact of States' same-sex marriage bans on adopted children and children in the child welfare system in the United States who have yet to find permanent homes. Specifically, in those States in which only married couples are permitted to adopt children jointly, bans on same-sex marriage deprive children who are adopted into same-sex parent families of legal ties with one of their parents, resulting in severe concrete and psychological harms to the children. Furthermore, *Amici* are concerned about how the same-sex marriage bans in those States harm the prospects of being adopted for children in foster care who are waiting for permanent families. Same-sex marriage bans discourage same-sex couples from adopting in those States that also do not permit same-sex couples to adopt jointly. *Amici* believe that, with more than 100,000 children waiting for adoption, the country cannot afford to lose any qualified couples willing and able to adopt children into happy, stable homes. For these reasons, *Amici* are submitting this brief in support of Petitioners.

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[1] No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Cuiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), counsel of record for Respondents gave blanket consent and counsel of record for Petitioners gave written consent to the filing of this brief.

The Donaldson Adoption Institute (DAI) is a national non-profit organization whose mission is to provide leadership that improves laws, policies, and practices in order to better the lives of everyone touched by adoption. It has done so since 1996. To achieve these goals, DAI conducts and reviews research; offers education to inform public opinion; promotes ethical practices and legal reforms; and works to translate policy into action. Eliminating policy and practice barriers—including obstacles faced by gay and lesbian individuals and couples—to adoption of children in foster care waiting for homes is one of DAI's priorities.

The Center for the Study of Social Policy (CSSP), a nonpartisan Washington, D.C., non-profit organization, has been working with state and federal policymakers and communities across the country for over thirty years. Focused on public policy, research and technical assistance, CSSP promotes smart policies that improve the lives of children and their families and works to achieve equity for those too often left behind. Using data, extensive community experience and a focus on results, CSSP's work covers several broad areas, including promoting public policies that strengthen vulnerable families; reforming child welfare systems; mobilizing a national network to prevent child abuse and promote optimal development for young children (Strengthening Families Initiative); assisting tough neighborhoods with the tools needed to help parents and their children succeed (Promise Neighborhoods); educating residents to be effective consumers securing better goods and services (Customer Satisfaction Project); and promoting, through all its work, an even playing field for children of all races, ethnicities, and income levels. CSSP's work in child welfare focuses on

ensuring that child welfare policies, practices, and systems meet the safety, permanency, and well-being needs of the children and youth that come to the attention of the public child welfare system. At the core of CSSP's efforts is a long-standing commitment that children need the stability and support of life-long families and that, whenever possible, children should remain with their biological families.

The Child Welfare League of America (CWLA), established in 1920, is the nation's oldest and largest membership-based child welfare organization. CWLA is a coalition of public and private agencies serving children and families who are vulnerable by advancing standards of excellence, accreditation, and the best research-based practices with respect to child welfare work. In particular, CWLA is recognized nationally as the standard-setter for child welfare services and publishes thirteen "Standards of Excellence" as a means to achieve professionalism and uniformity in the administration of child welfare services, including in particular Standards of Excellence for Adoption Services. CWLA's Standards also influence and improve child welfare practices throughout North America, as well as informing the Standards of Accreditation for agency administration, management, and service delivery for accredited child welfare agencies.

First Focus is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. First Focus leads a comprehensive advocacy strategy, with its hands-on experience with federal policymaking and a commitment to seeking policy solutions. One of First Focus' priority issues is Child Rights: Every child

should have quality healthcare, a good education, and a safe home and community.

The North American Council on Adoptable Children (NACAC) is a non-profit organization that promotes and supports permanent families for children and youth in the U.S. and Canada—especially children and youth who are or have been in foster care and those with special needs. To accomplish its mission, NACAC offers adoption support, capacity building for parents and youth, policy and advocacy, and education and information sharing. NACAC has long been dedicated to reducing barriers that prevent all children and youth from having a permanent, loving family, including restrictions that prevent or discourage gays and lesbians from adopting or fostering children who need a family.

Voice for Adoption (VFA) is a membership advocacy organization with a network of grassroots adoption and child welfare advocates throughout the country. VFA develops and advocates for improved adoption policies, and its members recruit and support adoptive families. Recognized as a national leader in special-needs adoption, VFA works closely with federal and state legislators to make a difference in the lives of the 102,000 children in foster care who are waiting to be adopted and the families who adopt children from foster care. VFA is concerned about children who unnecessarily languish in foster care in need of permanent families. VFA believes that children deserve every opportunity to have a permanent, loving family, and that ruling out prospective parents due to their sexual orientation limits children's options for permanency. VFA opposes policies and practices that discriminate against prospective parents, including

but not limited to discrimination based on age, race, ethnicity, gender, sexual orientation, religion, marital status, family size, disability, medical condition, geographic location, employment status, occupation, and educational attainment. VFA is supportive of policies, practices, and laws that ensure that young people in foster care are afforded the best opportunity to grow and lead successful lives, thus it supports making decisions about matching waiting children with prospective parents on a case-by-case basis, based on the best interests of each child.

SUMMARY OF ARGUMENT

There are more than 100,000 children in the United States waiting to be adopted.[2] Many of these children have not already been adopted because they have serious medical, emotional or psychological needs. These needs stem from backgrounds of adversity, loss, and instability, such as parental abuse and neglect, removal from their homes, and subsequent (sometimes multiple) temporary placements. Many of these children are also older, which makes them still less likely to be adopted. Whatever the reason, there is a backlog of children waiting for permanent, safe, and loving families in this country, and it is well documented that when these children are adopted and become part of a permanent family, their prospects for a happy, healthy, and productive future are greatly enhanced. Despite this fact, in some

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[2] *See* U.S. Dept. of Health and Human Services, Administration for Children and Families, *The AFCARS Report: Preliminary FY 2013 Estimates as of July 2014 (No. 21)*, at 1 (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf.

States, bans on same-sex marriage—and the laws that these bans impact, such as State laws that do not allow unmarried couples to adopt jointly or adopt each others' children—discourage an entire population of potentially qualified parents from adopting by only allowing one of the two adults in the couple to become the legal adoptive parent.

When the U.S. Court of Appeals for the Sixth Circuit upheld the same-sex marriage bans in Ohio, Tennessee, Kentucky, and Michigan, the Court explicitly credited the States' asserted interest in the "need to create stable family units for the planned and unplanned creation of children," so that "children may flourish." *DeBoer v. Snyder*, 772 F.3d 388, 404-05 (6th Cir. 2014). The illogic of the *DeBoer* decision is that, starting from this "stable family" rationale, it proceeds to uphold State laws that, in fact, undermine those very goals of creating stable family units where children may flourish.

Indeed, same-sex marriage bans severely harm children in a number of ways. The Sixth Circuit itself seemed to acknowledge as much when it wrote that the same-sex marriage bans "deprive[] [same-sex couples] of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children." *Id.* at 407-08. When children's parents are unable to marry or have their marriages recognized, the children suffer from the denial of resources and privileges that marriage brings to all other families, including financial and government benefits, health care, and stability. Those harms to children are primarily detailed in other *amicus curiae* briefs submitted to the Court.

This *amici curiae* brief focuses on the harms that affect children who are adopted into same-sex parent families and children in the child welfare system who are waiting to be adopted. When an adopted child only has a legal tie to one parent, he or she is vulnerable to a number of harms, both concrete and psychological. Adopted children also are stigmatized by assertions of the superiority of families headed by two biological parents—a stigma that has been judicially validated by the Sixth Circuit under the auspices of a constitutional analysis that is detached from the real world experiences of those who have been, or are waiting to be, adopted by same-sex parents. Furthermore, State bans on same-sex marriage adversely impact all children in the child welfare system who are waiting to be adopted. By discouraging qualified families from adopting, same-sex marriage bans in these States reduce children's opportunities to be placed in a family of their own, which results in more children remaining in the child welfare system for longer periods of time and, for some, aging out of the system without ever becoming part of a family. That sad aftermath has a severely damaging effect on the children and their chance for future success.

ARGUMENT

I. ADOPTED CHILDREN IN STATES THAT PROHIBIT SAME-SEX MARRIAGE SUFFER NUMEROUS AND PROFOUND HARMS, BOTH CONCRETE AND PSYCHOLOGICAL.

In some States, statutes or appellate case law make clear that only married couples can adopt jointly or adopt each other's children through so-called "second-parent" adoption. *See, e.g., S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 818-19 (Ky. Ct. App. 2008) (finding that the lesbian partner of the legal parent could not adopt the child because only married spouses could adopt one another's children); *Adoption of Meaux*, 417 So. 2d 522-23 (La. Ct. App. 1982) (barring joint adoption by unmarried couples in Louisiana); *Matter of Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991) (finding that it is inconsistent with Michigan's adoption statutes for two unmarried persons to jointly adopt); *DeBoer v. Snyder*, No. 12-10285, slip op. at 2 (E.D. Mich. Oct. 16, 2013) ("[the Michigan adoption code] and the Michigan Marriage Amendment operate in tandem to prevent" plaintiffs from adopting one another's children); *B.P. v. State* (*In re Luke*), 640 N.W.2d 374, 378 (Neb. 2002) (prohibiting second-parent adoption by unmarried couples in Nebraska); N.C. Gen. Stat. § 48-2-301 (prohibiting joint adoption by unmarried couples in North Carolina); *Boseman v. Jarrell*, 704 S.E.2d 494, 502 (N.C. 2010) (prohibiting second-parent adoption by unmarried couples in North Carolina); *In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1072-73 (Ohio Ct. App. 1998) (prohibiting second-parent adoption by unmarried couples in

Ohio); *Interest of Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994) (prohibiting second-parent adoption by unmarried couples in Wisconsin). Consequently, in a number of States, including three of the States within the Sixth Circuit, the exclusion of same-sex couples from marriage may mean that the partners in a same-sex relationship cannot both be legal parents to any children adopted into the family.

Denying children legal relationships with both of their parents is inherently unfair and leaves adopted children vulnerable. Granting Petitioners' request to strike down State bans on same-sex marriage would protect adopted children of same-sex parents from the significant concrete and psychological harms associated with having legal ties only to one of their parents.

A. Bans On Same-Sex Marriage Result In Concrete Harms To Adopted Children With Same-Sex Parents.

Over the past several years, this Court and other courts have found that State bans on same-sex marriage cause concrete harms to children of same-sex parents. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (finding that the Defense of Marriage Act (hereinafter "DOMA") "also brings financial harm to children of same-sex couples"); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 980

(S.D. Ohio 2013) (listing harms suffered by same-sex parent families as a result of marriage ban). Leading medical and social scientists echo the Court's concerns for children who suffer concrete harms and family instability from bans on same-sex marriage. Indeed, the American Academy of Pediatrics has advised that children of gays and lesbians need and deserve the same level of permanence and security in parental relationships as children of opposite-sex parents.[3]

Same-sex marriage bans also cause a special set of concrete harms and challenges for many adopted children who cannot have a legal parent-child relationship with both parents in those States in which only married couples can both be adoptive parents to children in the family.[4] Unless both parents

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[3] *See* American Academy of Pediatrics, *Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131 Pediatrics 827, 829 (April 2013), *available at* http://pediatrics.aappublications.org/content/early/2013/03/18/peds.2013-0376.full.pdf+html ("If a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interest of their child(ren) that legal and social institutions allow and support them to do so.") (hereinafter, "AAP, *Well-Being of Children*"); *see also* Ellen C. Perrin, M.D. & the Committee on the Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339, 341 n. 45343 (February 2002), *available at* http://pediatrics.aappublications.org/content/109/2/341.full.pdf+html (hereinafter, "AAP, *Technical Report*").

[4] This Court has recognized that laws treating children differently based on the circumstances of their birth are unconstitutional. *See, e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972) (striking down a law that treated children born outside of marriage differently than those born

can adopt a child together, all involved—the parents, the child, and more broadly, those responsible for social welfare—face undue stress and anxiety about which parent can legally provide health insurance and financial support, or even which parent has the right to make medical decisions for the child or enjoy official "parent" status in the eyes of teachers and school officials.

1. Adopted Children Of Same-Sex Parents Face Greater Risks To Their Health And Safety.

The most fundamental legal and moral responsibility of parents is ensuring the health and safety of their children.[5] In States that prohibit same-sex marriage and limit joint adoption or second-parent adoption to married couples, lesbian and gay parents are obstructed—and in some cases entirely prevented—from making critical medical decisions on behalf of their adopted children. Although informed consent laws vary from State to State, in general, State laws require hospitals and medical providers to obtain a legal parent or relative's consent for medical treatment of a child.[6] Thus, a non-legally recognized

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inside of marriage due to a State's moral objection because the law punished children for circumstances beyond their control).

[5] *See* Movement Advancement Project, Family Equality Council, and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families (Full Report)*, at 87 (October 2011), *available at* http://www.lgbtmap.org/file/all-children-matter-full-report.pdf (hereinafter, *"All Children Matter"*).

[6] *See id. See, e.g.*, Mich. Comp. Laws § 722.1, Emancipation of Minors Act (2014) (effectively serving as Michigan's consent law, giving control over an unemancipated minor to the minor's parents). *See also* Ann Maradiegue, *Minor's Rights Versus*

lesbian or gay parent, even one that is an adopted child's primary caregiver, may be unable to make routine or life-altering emergency medical decisions for a child.[7]

Yet another situation in which same-sex marriage bans put adopted children's health at risk is in the coverage of employer-provided health insurance benefits. A child's non-legal parent often cannot include that child on his or her employer's health insurance plan as a family member.[8] That puts families of same-sex couples in which only one individual is the legal parent at a severe financial disadvantage and can leave children uninsured—or relegated to other, less protective forms of insurance—if the non-legal parent is the only parent with access to employee health benefits. Alternatively, if the legal parent loses his or her job and health insurance coverage, the adopted child also would lose his or her health insurance coverage without the ability to be added to the non-legal parent's policy.[9]

Parental Rights: Review of Legal Issues in Adolescent Health Care, 48 Journal of Midwifery & Women's Health 170, 171 (2003) ("The elements required for informed consent differ from state to state. There are two basic standards required for informed consent: the medical community standard and the material risk or prudent patient standard.").

[7] *See All Children Matter*, *supra*, at 87.

[8] *See id.* at 79-80 (discussing limitations on lesbian or gay workers' ability to include family members on their health insurance benefit plans offered by employers).

[9] *See* Bryce Covert, *When Parents Can't Enroll in Medicaid, Children Stay Uninsured*, NYTimes.com, Sept. 26, 2012 (reporting the Government Accountability Office's findings that "84 percent of children had the exact same insurance status as their parents – if a father uses Medicaid, so will his daughter, but if a mother is uninsured, her son is also likely to be without

2. Adopted Children Of Same-Sex Parents Are Disadvantaged Upon The Death Or Disability Of A Parent.

Bans on same-sex marriage also "den[y] or reduce[] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security." *Windsor*, 133 S. Ct. at 2695 (citations omitted). In general, only the legal child of a worker is eligible for Old-Age, Survivors and Disability Insurance ("OASDI") benefits if a parent dies or becomes disabled. *See* 42 U.S.C. § 416(e). For the purposes of OASDI, the definition of "child" is limited to "the child or legally adopted child of an individual," a stepchild under limited circumstances, or a grandchild or stepgrandchild in limited circumstances. *Id.* Thus, a child would not be entitled to OASDI benefits if that child's parents were prohibited from marrying pursuant to a same-sex marriage ban and the deceased or disabled parent was not the legal parent and could not legally adopt the child. *See id.* This prohibition is devastating for children of same-sex parents because OASDI benefits are crucial for children and, in connection with other Social Security benefits, lifted more than one million children out of poverty in 2008 alone.[10] Moreover, in the absence of a specific instruction otherwise, if the non-legal parent dies, any life insurance benefits would not automatically pass to the couple's child or the deceased's partner.[11]

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coverage"), at http://parenting.blogs.nytimes.com/2012/09/26/when-parents-cant-enroll-in-medicaid-children-stay-uninsured/?_r=0.

[10] *See All Children Matter*, *supra*, at 74.

[11] Joseph J. Carroll, *Avoiding Backlash: The Exclusion of Domestic Partnership Language in the 2008 Amendments to the Uniform Probate Code and the Future for Same-Sex Intestacy Rights*, 85 Temp. L. Rev. 623, 633 (2013) ("Over time, the spousal

3. Families Headed By Same-Sex Parents With Adopted Children Face Unequal Tax Burdens.

Lesbian and gay parents of adopted children face additional tax inequities in States that prohibit same-sex marriages. *See Windsor*, 133 S. Ct. at 2684 (noting that under DOMA, same-sex couples would need to "follow a complicated procedure to file their state and federal taxes jointly"). For example, such couples encounter more difficulty in claiming an earned income tax credit. *See* 26 U.S.C. § 32. For the purposes of this credit, a "qualifying child" includes only a child that is the biological, step, foster, or adopted child of the taxpayer. *See* 26 U.S.C. § 152(f)(1). Thus, a parent who is prohibited from marrying his/her same-sex partner or establishing legal ties to the child through adoption could not claim the child as a dependent and may be ineligible for the earned income tax credit. *See id.* This is not a trivial tax disadvantage for families of same-sex couples because the earned income tax credit is estimated to have lifted more than three million children out of poverty in 2010.[12]

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share in most states' intestacy statutes has increased to at least one-half of the decedent's estate and in many states the surviving spouse inherits the entire estate. The [Uniform Probate Code] takes the same approach by permitting only legal spouses to inherit from a decedent's estate. Unfortunately, for many individuals in a same-sex relationship who are unable to marry or enter into a civil union or domestic partnership, intestacy law has the effect of denying the surviving partner any share of the decedent's estate.")

[12] *See* Movement Advancement Project, Family Equality Council, and Center for American Progress, *Unequal Taxation and Undue Burdens for LGBT Families*, at 13 (April 2012),

Families headed by same-sex parents with adopted children encounter similar difficulties in filing their tax returns as Heads of Households. To be eligible for filing as a Head of Household, a taxpayer must, among other requirements, pay more than half the cost of keeping the home for a year and have a dependent, such as a "qualifying child," living in the home of the taxpayer for more than half the year. 26 U.S.C. § 2(b). As with the earned income tax credit, the Head of Household restrictions incorporate the definition of "qualifying child" from 26 U.S.C. § 152. Accordingly, a taxpayer residing in a State that prohibits same-sex marriage but limits joint adoption to married couples, may not qualify to file as Head of Household based upon the children of the taxpayer's partner (the legal parent), despite meeting the other requirements. *See id.*; 26 U.S.C. § 2(b)(1)(A)(i). In such instances, the taxpayer and his or her child(ren) will be denied the higher standard deduction available to those filing as Head of Household, a benefit of nearly $3,000 in 2014 ($9,100 for Head of Household vs. $6,200 for single filers).[13]

B. Bans On Same-Sex Marriage Result In Psychological Harms To Adopted Children With Same-Sex Parents.

Significant psychological harm compounds the concrete disadvantages that impact adopted children and their families as a result of the States' same-sex

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available at http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf.

[13] *See* Internal Revenue Service, *Publication 501: Exemptions, Standard Deductions, and Filing Information*, at Table 6 (2014), *available at* www.irs.gov/publications/p501).

marriage bans in States where marriage is required for both partners to adopt. Marriage bestows essential legal status upon same-sex parents and their children, including societal recognition, which, in turn, carries with it a number of intangible benefits, such as "clarity, security, structure, dignity, . . . and an expectation of permanence, dedication, and stability."[14]

For this reason, when same-sex couples are forbidden to marry, their children—and especially adopted children who can only have one legal parent in some States—suffer from a number of psychological harms. This is a fundamental injustice to innocent children that the courts have emphasized repeatedly over the last dozen years. *See, e.g.*, *Windsor*, 133 S. Ct. at 2694 (finding refusal to recognize same-sex marriage "creat[es] two contradictory marriage regimes," which "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives"); *Kitchen v. Herbert*, 755 F.3d 1193, 1226 (10th Cir. 2014) ("[S]ame-sex marriage restrictions communicate to children the message that same-sex parents are less deserving of family recognition than other parents."); *De Leon v. Perry*, 975 F. Supp. 2d 632,

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[14] Evan Wolfson, Why Marriage Matters Appendix B (Simon & Schuster, eds., 2005). *See also* James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 Pediatrics 349, 356 (2006) ("Civil marriage...provides a context for legal, financial, and psychosocial well-being, an endorsement of interdependent care, and a form of public acknowledgment and respect for personal bonds.") (hereinafter, "Pawelski, *Effects of Marriage*").

653 (W.D. Tex. 2014) (finding same-sex marriage ban "denies children of same-sex parents the protections and stability they would enjoy if their parents could marry"); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) (finding same-sex marriage ban "needlessly stigmatiz[es] and humiliat[es] children who are being raised by [] loving couples" and needlessly deprive[s] [these children] of the protection, the stability, the recognition and the legitimacy that marriage conveys"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (finding "[e]xcluding same-sex couples from civil marriage" prevents their children "from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which the children will be reared, educated, and socialized.") (internal citations omitted).

1. Adopted Children Of Same-Sex Parents Are Vulnerable To Psychological Stress Associated With The Instability of Having Only One Legally "Official" Parent.

Stability and security in the family structure are fundamental to a child's health and well-being.[15] Such stability can come from the child's confidence in his or her family's permanency—that is, that both parents are in a committed relationship that is recognized like any other marriage—and *not* accorded some lesser,

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[15] *See All Children Matter*, *supra*, at 18; William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 The Future of Children 97, 108 (2005), *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf ("[S]tability is, most scholars agree, of vital importance to children.") (hereinafter, "Meezan & Rauch, *America's Children*").

more fragile second-class status.[16] While a child—adopted or not—of heterosexual parents can enjoy the security that comes from being a legal child of both parents in every State, the bans on same-sex marriage in some States, coupled with laws allowing only married couples to adopt together, means that an adopted child of parents in a same-sex relationship "may have one parent deemed a legal stranger by law, threatening to undercut family permanency."[17] For example, if the legal parent of an adopted child dies, the child can be removed from the surviving non-legal parent, put in a foster home with strangers, and thus potentially lose both loving parents that the child has known his or her entire life. Even if the non-legal parent eventually wins custody, "the process may leave the child in limbo for an extended period of time."[18] There is no question that it is "best for children if the parent with whom they have bonded takes over responsibility and daily decision-making immediately and permanently" in such situations of death or separation.[19] Once an adopted child bonds with his or her parents, "continuity of the relationship" is critical for the child's continued health and development.[20] This continuity is far from assured

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[16] *See All Children Matter, supra*, at 18. *See also* Meezan & Rauch, *America's Children*, *supra*, at 108 ("In the heterosexual world, a substantial body of research shows that, other things held equal, marriages are more durable and stable than cohabitation.").

[17] *All Children Matter, supra*, at 2.

[18] Brief for American Psychological Association as Amici Curiae at 4, *In Re Adoption of Luke*, Case No. S-01-0053 (Neb. Sept. 10, 2001).

[19] *Id.* at 5.

[20] *Id.* at 3.

when only one parent in a same-sex relationship can legally adopt a child.

In States where marriage bans preclude legal ties between both same-sex parents and the children, lesbian and gay parents encounter further difficulties ensuring the security of their children if they separate from their partner. For instance, some States allow only legally recognized parents to seek custody or visitation with children.[21] As a result, depending on the State, a child might not be able to live with the most suitable parent or caregiver, and may even be entirely separated from a non-legal parent who has cared for the child through his or her entire life.[22] Additionally, non-legally recognized parents may not be required to provide child support or other financial support for their children. *See Windsor*, 133 S.Ct. at

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[21] *See id.* at 44. *See also* Emily Haney-Caron and Kirk Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice,* 1 Psychology of Sexual Orientation and Gender Diversity 19, 23 (2014) ("[O]nly legal parents can seek custody in most states when there is no showing of substantial harm to the child that would result from the legal parent(s) receiving custody."), *available at* http://www.apa.org/pubs/journals/features/sgd-0000020.pdf (hereinafter, "*Child Custody*").

[22] *See All Children Matter*, *supra*, at 44; *Child Custody*, *supra*, at 23 ("This legal landscape creates potential risks for both parents in a same-sex relationship—the biological or adoptive 'legal' parent, and the 'nonlegal' parent. The nonlegal parent may lose all access to the child on dissolution of the relationship, and may be denied both custody and visitation by his or her former partner and by the courts. The legal parent, on the other hand, may face both a former partner who refuses to support the child they intentionally created or adopted together with the intention that they share equal responsibility, and a court that will not order child support payments because the partner's parentage is not legally recognized.").

2694 (recognizing that DOMA deprived children "of the Bankruptcy Code's special protections for domestic-support obligations"). By banning same-sex marriages, some States have essentially validated these unfair realities, which have grave psychological and financial implications for adopted children when their same-sex parents separate, thereby ensuring that such children will continue to face similar harms in the future.

Deprivation of the essential element of security can cause children of same-sex parents to struggle throughout their lives.[23] This is especially true for children who are adopted from foster care as these children often come from backgrounds of family instability and are, therefore, particularly vulnerable.[24]

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[23] *See All Children Matter*, *supra*, at 13. *See also* Leslie Cooper and Paul Cates, American Civil Liberties Union, *Too High a Price: The Case Against Restricting Gay Parenting*, at 17 (2006) ("Denying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychologic and legal security that comes from having two willing, capable, and loving parents."), *available at* https://www.aclu.org/files/images/asset_upload_file480_27496.pdf (hereinafter, "Cooper & Cates, *Too High A Price*").

[24] *See, e.g.*, Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 The Future of Children 31, 38, 39 (2004) (reporting that "placement instability is associated with negative developmental outcomes for foster children," causing "behavioral and emotional problems, such as aggression, coping difficulties, poor home adjustment, and low self-concept"), *available at* http://futureofchildren.org/futureofchildren/publications/docs/14_01_02.pdf. The study further finds that "children's perceptions of the impermanency of their placements have also been linked to behavioral difficulties." *Id.* at 39. *See also* Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 JCAPN 70, 70 (2008) ("Painful experiences associated with maltreatment and the trauma of

II. THE STATES' "OPTIMAL FAMILY" RATIONALE AGAINST SAME-SEX MARRIAGE STIGMATIZES FAMILIES WITH ADOPTED CHILDREN AS SUB-OPTIMAL.

The States in the Sixth Circuit justify their same-sex marriage bans with the refrain that the optimal family environment for children is one headed by two biological parents. *See, e.g.*, *Love v. Beshear* 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014) (noting State's asserted interest in "encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate"); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014) (noting one of State's asserted rationales for marriage exclusion was "providing children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development"); *Obergefell*, 962 F. Supp. 2d at 994 (noting State's argument in support of marriage ban "that children raised by heterosexual couples are better off than children raised by gay or lesbian couples"); *Bishop v. Holder*, 962 F. Supp. 2d 1252, 1293 (N.D. Okla. 2014) (proffered justification for marriage ban was "'promoting' the 'ideal' family unit," which defendant defined as "a family headed by two biological parents in a low-conflict marriage").

That "rationale"—the purported superiority of biological parent families—has not just been discredited as a matter of social science, but today perpetuates an insidious message to the thousands of children adopted by heterosexual and gay parents, as well as the countless other children who are not

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being removed from one's parents (foster care) may affect the developmental and mental health of children."), *available at* http://www.alumniofcare.org/assets/files/jcap_134.pdf.

biologically related to one or both of their parents, *e.g.*, children conceived through assisted reproduction involving donor sperm or ova.[25]

Adopted children can grow up as happy and healthy as other children.[26] Ultimately, "children need support and nurturing from stable, healthy, and well-functioning adults" in order to thrive.[27] Adoptive parents, regardless of their sexual orientation,[28] are

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[25] This Court has found a State's action that stigmatizes children is relevant to assessing the constitutionality of such State action because the safety and security of children is a valid governmental objective. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (striking down a Texas statute authorizing local school districts to deny enrollment to undocumented immigrant children because the law "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives . . . . In determining the rationality of [the law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."). In this case, the States' action in banning same-sex marriage sends a strong message about what the State considers the optimal family, and that message stigmatizes children.

[26] *See* Anu R. Sharma, Matthew K. McGue, Peter L. Benson, *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part II. Age of Adoption*, 18 Children and Youth Services Rev. 101, 110 (1996) (children adopted at young ages have outcomes comparable to their peers); *see also* Brent Miller et al., *Comparisons of Adopted and Non-Adopted Adolescents in a Large, Nationally Representative Sample*, 71 Child Development 1458 (2000).

[27] AAP, *Well-Being of Children* at 827 (supporting "[a]doption by single parents, coparents adopting together, or a second parent when one parent is already a legal parent by birth or adoption, without regard to the sexual orientation of the adoptive parent(s)").

[28] *See* AAP, *Technical Report*, *supra*, at 343 (stating the weight of evidence gathered over the last several decades demonstrates

just as capable of supporting and nurturing children as biological parents.[29] All of the leading medical and health professional associations in the United States have recognized this, expressing their full support of adoption by same-sex parents.[30] For example, the American Medical Association has a policy supporting legislative and other reforms to allow adoption by same-sex partners because "[h]aving two fully sanctioned and legally defined parents promotes a safe and nurturing environment for children, including psychological and legal security."[31]

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that "there is no systematic difference between gay and non-gay parents in emotional health, parenting skills, and attitudes toward parenting"). *See also Bassett v. Snyder*, 2014 U.S. Dist. LEXIS 159253, at *29 (E.D. Mich. Nov. 12, 2014) ("[G]ay couples, no less than straight couples, are capable of raising children and providing stable families for them.") (internal citations omitted).

[29] *See* AAP, *Well-Being of Children*, *supra*, at 827.

[30] Courts have also acknowledged that a child's interests are just as well-served by same-sex adoptive parents. *See, e.g., In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, No. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the wellbeing of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

[31] Am. Med. Ass'n, Policy H-60.940, Partner Co-Adoption, *available at* http://www.amaassn.org/ama/pub/about-ama/our-

Courts have frequently recognized the criticality of assuring that children of same-sex parents, whether adopted or otherwise, know that their family is respected, that their relationships with both of their parents are stable, and that their familial ties are legally recognized.[32] Indeed, the recognition of same-sex marriage is important because of its legitimizing effect on the children of same-sex parents, who yearn to "feel secure in knowing that their parents' relationships are as valid and as valued as the marital relationships of their friends' parents." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 474 (Conn. 2008). The existence of same-sex marriage will ultimately "reduce the stigmatization or perceived peculiarity of same-sex parent families, which would presumably reduce the social pressure on the children."[33]

III. STATE BANS ON SAME-SEX MARRIAGE DETER POTENTIAL ADOPTIVE PARENTS.

State bans on same-sex marriage adversely impact children in this country's child welfare system. In States that ban same-sex marriage and only allow joint or second-parent adoption by married couples, qualified, willing, and happy families—families that are statistically *more likely* to adopt children—are deterred from adopting one of the thousands of

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people/member-groups-sections/glbt-advisorycommittee/ama-policy-regarding-sexual-orientation.page.

[32] *See* AAP, *Technical Report*, *supra*, at 339.

[33] Meezan & Rauch, *America's Children*, *supra*, at 109. *See also* Pawelski, *Effects of Marriage*, *supra*, at 361 ("Civil marriage can help foster…an augmented sense of societal acceptance and support.").

children in the child welfare system waiting for permanent placements. Long waits in the foster care system before adoption cause instability for children and expose them to profound psychological harms. These negative impacts run counter to the States' justification for their same-sex marriage bans: To encourage and regulate "stable family units for the planned and unplanned creation of children," so that "children may flourish." *DeBoer*, 772 F.3d at 404-05.

A. Same-Sex Couples Are Far More Likely To Adopt Or Foster-Parent Children.

Studies have shown that same-sex couples are four times more likely as opposite-sex couples to adopt or foster children. Among same-sex couples with children under the age of 18 in the home, 13% have an adopted child, compared to only 3% of opposite-sex couples.[34] In raw numbers, more than 16,000 same-sex couples are raising an estimated 22,000 adopted children in the United States.[35] Same-sex couples are also six times more likely than their opposite-sex counterparts to be raising foster children,[36] and 3% of children in all forms of family foster care are living with lesbian or gay foster parents.[37]

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[34] Gary J. Gates, Williams Institute, *LGBT Parenting in the United States*, at 3 (February 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

[35] *See id.*

[36] *See id.*

[37] *See* M.V. Lee Badgett, Kate Chambers, Gary J. Gates, and Jennifer Ehrle Macomber, Williams Institute and Urban Institute, *Adoption and Foster Care by LGBT Parents in the United States*, at 15 (March 2007), *available at* http://www.urban.org/uploadedpdf/411437_adoption_foster_care

B. Deterring Qualified Parents From Adopting Exacerbates Waits In The Child Welfare System And Causes Severe Harm To Both Children And Society.

In States that allow only married couples to adopt jointly but exclude same-sex couples from marriage, same-sex couples are deterred from adopting children. That same-sex couples cannot jointly adopt suggests that they are not qualified or welcome and may discourage them from even applying to adopt, thus further limiting the already inadequate pool of prospective adoptive parents to those willing to assume such additional risks. Moreover, if a couple does contact an agency to explore adoption, nothing could be more disrespectful than being told that one partner in the relationship can adopt but the other cannot.[38] Couples in same-sex relationships also could be deterred by the stress, insecurity, and challenge of raising a family without a legal tie between both parents and the adopted child or children. *See* Section I, *supra*.

Laws that create barriers for gay and lesbian couples to adopt jointly reduce the availability of qualified, suitable families for children. As of July 2014, there were more than 402,000 children in foster care, of which nearly 102,000 were awaiting adoption.[39] Of those 102,000 children awaiting

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.pdf (hereinafter "Badgett et al., *LGBT Adoption and Foster Care*").

[38] Transcript of Record at 83, *DeBoer v. Snyder*, No. 12-10285 (E.D. Mich. Feb. 25, 2014), ECF No. 143.

[39] *See* U.S. Dept. of Health and Human Services, Administration for Children and Families, *The AFCARS Report: Preliminary FY 2013 Estimates as of July 2014 (No. 21)*, at 1

adoption, more than half (54%) had been waiting longer than two years, while a significant portion (13%) had been waiting longer than five years for a permanent home.[40] Discouraging same-sex couples—couples that tend to be more motivated to adopt[41]—means that many of the children waiting to be adopted will have to wait longer, and some will age out of foster care without having a permanent, stable family of their own. Decreasing the number of potential adoptive and foster parents also runs counter to Congress' own intent. In 1997, Congress passed The Adoption and Safe Families Act, which, "in response to rising numbers of children in foster care[,] . . . was intended to *expedite permanency* for foster children and to promote adoption for those children who cannot safely return home."[42]

Long waiting periods decrease children's stability and expose them to myriad harms. Due to a shortage of adoptive families and the consequent longer waiting periods, children in the child welfare system have an increased likelihood of being separated from siblings

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(2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf.

[40] *See id.* at 5.

[41] *See* U.S. Dept. of Health and Human Services, Administration for Children and Families, *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption*, at 5 (2011), *available at* https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf (hereinafter, "DHHS, *LGBT Families in Adoption*").

[42] Karen Spar and Matthew Shuman, Congressional Research Service, *Child Welfare: Implementation of the Adoption and Safe Families Act (P.L. 105-89)*, at 2 (Nov. 8, 2004), *available at* http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/RL30759_gb.pdf (emphasis added).

or aging out of the foster care system without ever finding their own family.[43] Aging out of the foster care system has a strong negative impact on a child's future. Young adults who age out of the foster care system without being placed in a permanent, loving, and supportive home exhibit high levels of unemployment, low incomes, low rates of education beyond high school, high reliance on public assistance, high risk of teen pregnancy, and high rates of mental health disorders, homelessness, and poverty.[44]

Restrictions on same-sex marriage deprive some of the most vulnerable children in foster care of stable, loving families. Children likely to wait in temporary care longer, such as those with special needs or who are lesbian, gay, bisexual or transgender ("LGBT") are disadvantaged by restrictions on adoption and fostering by same-sex couples. Research demonstrates that because same-sex couples have an understanding of how it feels to be different and may have overcome oppression and discrimination in their own lives,[45] they may be more willing than opposite-sex couples to adopt children viewed as different—including special needs children, "who are among the most difficult to place,"[46] and LGBT youth. Placements with same-sex couples also can be beneficial for some LGBT young people, as same-sex parents can draw on personal

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[43] *See* Cooper & Cates, *Too High a Price*, *supra*, at 78.

[44] *See id*, at 78. *See also* Badgett et al., *LGBT Adoption and Foster Care*, *supra*, at 18.

[45] *See* DHHS, *LGBT Families in Adoption*, *supra* at 5.

[46] Movement Advancement Project, Family Equality Council, and Center for American Progress, *LGBT Foster and Adoptive Families: Finding Children Forever Homes*, at 3 (June 2012), *available at* http://www.lgbtmap.org/file/finding-children-forever-homes.pdf.

experience to connect with and assist LGBT youth, who are over-represented and chronically underserved by the foster care system.[47]

Furthermore, State and Federal governments incur significant costs running the foster care system, costs that are directly tied to the number of children waiting in the system. The Williams Institute estimated that if no same-sex couples were allowed to adopt, it could add $87 to $130 million in foster care system expenditures each year.[48] Discouraging or preventing qualified adoptive parents leaves more children in foster care for longer periods of time, and this, in turn, costs the State and Federal governments more money.

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[47] Colleen Sullivan, Susan Sommer, and Jason Moff, Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care*, (2001), *available at* http://www.jimcaseyyouth.org/sites/default/files/documents/youthinthemargins_2001.pdf.

[48] *See* Badgett et al., *LGBT Adoption and Foster Care*, *supra* at 19.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Sixth Circuit should be overturned and this Court should hold that the Fourteenth Amendment does require States to license a marriage between two people of the same sex and to recognize those marriages lawfully licensed and performed in other states.

Respectfully submitted,

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March 6, 2015